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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID RYAN UNRUH, Defendant and Appellant.	E063818 (Super.Ct.No. FMB006783) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed with directions.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Julie L. Garland, Assistant Attorney General; and Scott C. Taylor and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal following a resentencing hearing ordered by the Ninth Circuit Court of Appeal after it found sentencing error. Defendant David Ryan Unruh contends

the trial court erred by not ordering and considering an updated probation report before imposing a new sentence and by failing to recalculate his presentence custody credits. He further contends that his sentence constitutes cruel and unusual punishment. We agree that the trial court erred in failing to recalculate defendant's custody credits; otherwise, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 2004, defendant shot his fiancée in the face after they argued about travel plans. The bullet entered her right cheek and lodged in the mastoid bone behind her right ear, temporarily paralyzing her face and permanently destroying most of her hearing. When her 13-year-old son appeared, defendant held a gun to the child's head. She asked defendant twice to let her son go; after a couple of minutes, defendant finally removed the gun from the boy's head and the boy left the room. (*People v. Unruh* (Aug. 3, 2006, E039006 [nonpub. opn.].)[1]

The jury found defendant guilty of the willful, deliberate and premeditated attempted murder of his fiancée (Pen. Code,[2] §§ 664, subd. (a), 187; count 1); assault with a firearm against her (§ 245, subd. (a)(2); count 2); corporal injury to a cohabitant (§ 273.5, subd. (a); count 3); assault with a firearm against the child (§ 245, subd. (a)(2); count 4); willful endangerment of a child (§ 273a, subd. (a); count 5); and forcible false imprisonment of the child (§ 236; count 6). As to each of the six counts, the jury found

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[1] The facts are taken from this court's opinion in defendant's previous appeal. (*People v. Unruh* (Aug. 3, 2006, E039006 [nonpub. opn.].)

[2] All further statutory references are to the Penal Code unless otherwise indicated.

true the special allegation that defendant personally used a firearm. (§ 12022.5.) As to counts 2 and 3, the jury found true the special allegations that defendant inflicted great bodily injury. (§ 12022.7.) As to count 1, the jury found true the special allegations that the attempted murder was willful, deliberate, and premeditated (§ 664, subd. (a)) and that defendant's acts fell within § 12022.53, subdivisions (b) through (d), in that defendant personally used a firearm, intentionally discharged a firearm, and in doing so caused great bodily injury. (*People v. Unruh*, *supra*, E039006.)

The trial court sentenced defendant as follows: On count 1, an indeterminate term of life imprisonment plus a consecutive term of 25 years to life for the section 12022.53, subdivision (d) finding; on count 5, a consecutive aggravated term of six years plus a consecutive aggravated term of 10 years for the section 12022.5, subdivision (a) finding. The terms and enhancements on the other counts were stayed under section 654. (*People v. Unruh*, *supra*, E039006.)

On February 13, 2008, defendant filed a petition for writ of habeas corpus in the United States District Court, Central District of California, on three grounds, including the argument that defendant's Sixth Amendment rights were violated by "the trial court engag[ing] in factfinding in order to impose an upper-term sentence." Initially, the district court denied the petition, however, the Ninth Circuit Court of Appeals reversed the district court's ruling and granted the Petition "on the ground that [defendant] suffered a constitutional violation when he was given an enhanced sentence based on aggravating facts found by a judge by a preponderance of the evidence, and not by a jury

beyond a reasonable doubt." Based on the Ninth Circuit's decision, the district court remanded the case to the San Bernardino County Superior Court for resentencing.

On February 18, 2015, defendant moved for an updated probation report and psychological evaluation. The trial court denied the motion on the grounds that the "issue on re-sentencing is what facts and circumstances were at the time of the finding of guilty. What existed at that time. And that is what [t]he Court has to consider for re-sentencing. You're requesting issues that would be related for the parole board to evaluate [your] release and [t]he Court is not going to be considering any additional probation report." On June 12, 2015, the court resentenced defendant to an aggregate term of 40 years to life, consisting of a determinate term of eight years plus an indeterminate term of 32 years to life, calculated as follows: on count 1, an indeterminate term of seven to life plus a consecutive term of 25 years to life for the section 12022.53, subdivision (d) enhancement; on count 5, a consecutive middle term of four years plus a consecutive middle term of four years for the section 12022.5, subdivision (a) enhancement. The court stayed the terms and enhancements on the other counts pursuant to section 654.

II. DISCUSSION

A. Defendant Was Not Entitled to an Updated Probation Report or Psychological Evaluation.

Defendant faults the trial court for denying his request for an updated probation report and psychological testing. He acknowledges that an updated report is not mandatory in all remanded cases, whether or not the person is eligible for probation.

(*People v. Bullock* (1994) 26 Cal.App.4th 985, 989, fn. 5.) However, he argues that the trial court should provide a "sound reason for departing from the preferred practice of making the referral." Here, the trial court provided its reason when it explained that the "issue on re-sentencing is what facts and circumstances were at the time of the finding of guilty." Regarding a psychological evaluation, the court said that such evaluation conducted almost a decade after the crime "is irrelevant for the remand for resentencing." Nonetheless, the defendant emphasizes his exemplary postconviction behavior and asserts the trial court was unaware that it could consider this evidence upon resentencing, and thus failed to recognize and exercise the full scope of its discretion. We disagree.

Because defendant was not eligible for probation given his conviction of attempted murder (§§ 1203.06, subd. (a)(1)(A), 12022.53, subd. (g)), the trial court had discretion to request an updated probation report. (§ 1203, subd. (g).) The court considered defendant's request for an updated report, but determined it to be unnecessary. We presume the trial court was aware of the law prescribing no updated probation report and followed it. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) Defendant has not demonstrated an abuse of discretion.

Notwithstanding the above, even if we were to assume that the trial court erred in refusing to order an updated probation report and/or consider defendant's postconviction behavior, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 834; *People v. Dobbins* (2005) 127 Cal.App.4th 176, 182 [any alleged error in denying a supplemental probation report implicates only California statutory law].) Despite the lack of an updated probation report, defendant's sentencing memorandum provided the

trial court with substantial information on defendant's exemplary conduct during the years since his conviction. The trial court was aware of the federal court's recommendation, and "read . . . defendant's sentencing memorandum [and] all accompanying exhibits and attachments, including the defendant's CDC, quote, 'C' file, end quote," the 2005 probation report, and the transcript of the original sentencing hearing. The court noted: "The crimes involved great viciousness and callousness. Both victims were particularly vulnerable as they were victimized in their own home as the defendant was armed, and neither victim was in a position to protect themselves. He engaged in violent behavior that shows he is a serious danger to society." In resentencing defendant, the trial court chose the middle, not the aggravated, term.

While the trial court considered defendant's good behavior as stated in his sentencing memorandum, the court expressly declined to exercise its discretion to impose lesser terms based on the facts and circumstances of the underlying convictions. The trial court had before it all of the information necessary to make an informed decision about the appropriate sentence for defendant, and understood it had discretion to choose a term lower than the middle term. An updated probation report would have added little to the proceedings. We conclude, therefore, that there is not a reasonable possibility, let alone a reasonable probability, that defendant suffered any prejudice as a result of the trial court's decision to forgo an updated probation report and psychological examination. *(People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

B. Defendant's Sentence Does Not Constitute Cruel or Unusual Punishment.

Defendant contends his determinate and indeterminate sentence totaling 40 years to life constitutes cruel and/or unusual punishment under the California and federal Constitutions because, given his age, it amounts to a de facto sentence of life without the possibility of parole (LWOP). We conclude the claim is without merit.

The Eighth Amendment of the federal Constitution, which prohibits cruel and unusual punishment, is violated when the sentence is "'grossly disproportionate to the severity of the crime.'" (*Ewing v. California* (2003) 538 U.S. 11, 21.) The California Constitution bars cruel or unusual punishment (Cal. Const., art. I, § 17) and is violated if the sentence "is so disproportionate to the crime . . . that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) "The main technique of analysis [in determining whether a sentence is disproportionate] under California law is to consider the nature both of the offense and of the offender. [Citation.] The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494, citing *People v. Dillon* (1983) 34 Cal.3d 441, 479.) The proportionality analysis is largely similar under the federal Constitution. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

In support of his claim that his sentence constituted cruel and/or unusual punishment, defendant argues that he is a Marine Corps veteran whose crime resulted from a "short-lived emotional outburst" that momentarily placed two people in great danger, however, there is no evidence he planned to harm them, the child suffered no physical harm, and defendant expressed remorse. Defendant downplays his convictions for attempted murder and willfully endangering a child and the facts of the offenses, i.e., he shot his fiancée in the face with little warning, held a gun to her son's head instead of immediately seeking medical care for her, lied about the incident to the police, and failed to express remorse after the incident. Defendant was in his fifties, he acted alone, and there was no provocation. (*People v. Unruh*, *supra*, E039006.) He shot his fiancée because she did not want to travel to Texas and gave him back a ring and necklace that he had purchased for her. (*Ibid*.) For his offenses, defendant was sentenced to life in prison with a minimum of seven years for shooting his fiancée in the face, and only four years for willfully endangering her son. The majority of defendant's sentence was composed of mandatory firearm use enhancements. Sentencing under such enhancements (§ 12022.53) does not constitute cruel or unusual punishment. (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000-1002 [sentencing under section 12022.53, subdivision (b) did not constitute cruel or unusual punishment]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1231 [accord regarding section 12022.53, subdivision (d)].)

Defendant asserts that because of his age, the fact he had no prior record of violence, and the fact he has shown himself capable and worthy of rehabilitation, his sentence is so disproportionate to his offenses as to be cruel and unusual under the federal

Constitution. We disagree. The protection afforded by the Eighth Amendment is narrow. It applies only in the "'exceedingly rare'" and "'extreme'" case. (*Ewing v. California*, *supra*, 538 U.S. at p. 21.) We are not convinced this is such a case. The mandatory firearm use enhancement is noteworthy. However, defendant's crimes are also noteworthy. He shot his fiancée in the face and then held a gun to her child's head. He cites no persuasive authority to support his claim his exemplary behavior while incarcerated presents a case in which his aggregate 40-years-to-life sentence is so grossly disproportionate to the gravity of his offenses that it violated the Eighth Amendment's proscription against cruel and unusual punishment.

Accordingly, we conclude this is not the exceedingly rare and extreme case that violates the federal Constitution.

C. The Trial Court Was Required to Recalculate Defendant's Presentence Custody Credits.

Defendant contends that the trial court was required to recalculate and credit his actual time in custody, including time served both in prison and in county jail, at the resentencing hearing. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29 ["[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he

was originally committed and delivered to prison custody"]; § 2900.1.[3]) The People offer no opposition. We will remand the matter for that limited purpose. We also note that the trial court failed to identify the new abstract of judgment as an "Amended Abstract of Judgment." On remand, the trial court shall make this correction.

III. DISPOSITION

The matter is remanded for the limited purpose of permitting the trial court to recalculate and award defendant presentence credit for his actual time in custody, i.e., time served in prison and time served in county jail (including presentence credit previously awarded), to prepare an amended abstract of judgment, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MCKINSTER
J.

[3] Section 2900.1 provides: "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."